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Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms

Promotion of a democratic and equitable international order

Note by the Secretary-General

The Secretary-General has the honour to transmit to the General Assembly the interim report of the Independent Expert on the promotion of a democratic and equitable international order, Alfred-Maurice de Zayas, submitted in accordance with Assembly resolution 68/175.

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Interim report of the Independent Expert on the promotion of a democratic and equitable international order

Summary

The present report is the Independent Expert's third to the General Assembly and is submitted pursuant to paragraph 19 of Assembly resolution 68/175. It supplements previous reports to the Assembly and the Human Rights Council on other aspects of the mandate and focuses on the implementation of the right of self-determination as key to the international order envisaged by the Charter of the United Nations and a constitutive element of Council resolution 18/6. Bearing in mind that over the past decades many conflicts were related to the denial of self-determination, the report explores the vision that the universal realization of self-determination will contribute to greater enjoyment of human rights, peace and stability as envisaged in Article 1 (2) of the Charter. The Independent Expert acknowledges the need to balance competing rights and interests in the spirit of the Charter and proposes criteria to facilitate an understanding of the various manifestations of self-determination.

I. Introduction

1. In its resolution 68/175, the General Assembly took note of the major changes taking place on the international scene and the aspirations of all peoples for an international order based on the principles enshrined in the Charter of the United Nations, including promoting and encouraging respect for human rights and fundamental freedoms for all and respect for the principle of equal rights and self-determination of peoples, peace, democracy, justice, equality, the rule of law, pluralism, development, better standards of living and solidarity. Bearing in mind that all States have a legal obligation to observe the purposes and principles of the United Nations and work to strengthen its three pillars — peace, development and human rights — the present report builds on paragraph 5 of resolution 68/175, in which the Assembly affirmed that a democratic and equitable international order required the realization of, among other things:

(a) The right of all peoples to self-determination, by virtue of which they can freely determine their political status and freely pursue their economic, social and cultural development;

(b) The right of peoples and nations to permanent sovereignty over their natural wealth and resources;

(c) The right of every human person and all peoples to development;

(d) The right of all peoples to peace.

2. In this connection, the Independent Expert has given attention to General Assembly resolution 68/153 and to the report of the Secretary-General on self-determination (A/68/318), which recognize that universal realization of self-determination is a fundamental condition for the effective guarantee and observance of human rights. He further acknowledges the study on the impacts of the Doctrine of Discovery on indigenous peoples, including mechanisms, processes and instruments of redress, submitted to the Permanent Forum on Indigenous Issues, in which special rapporteurs are encouraged to play a role in establishing relevant standards (E/C.19/2014/3, para. 36). Since 2012, the Independent Expert has received an increasing number of appeals and communications from stakeholders concerning self-determination issues.[1]

3. In its essence, the right of self-determination means that individuals and peoples should be in control of their destinies and should be able to live out their identities, whether within the boundaries of existing States or through independence. More than an outcome, self-determination should be seen as a process subject to revision and adjustment, and its outcome must correspond to the free and voluntary choice of the peoples concerned,[2] within a framework of human rights protection and non-discrimination. Self-determination cannot be understood as a one-time choice, nor does it extinguish with lapse of time because. Like the rights to life, freedom and identity, it is too fundamental to be waived. As an ongoing democratic

[1] Including at the expert consultations convened by the Independent Expert in Geneva in May 2013 and in Brussels in May 2014, at which representatives of the Indigenous Peoples and Nations Coalition, the Indian Council of South America, representatives of Australian Aborigenes and the International Human Rights Association of American Minorities spoke.

[2] International Court of Justice, *Western Sahara, Advisory Opinion, I.C.J. Reports 1975*, p. 12.

exercise, self-determination entails a people's equal participation[3] in decision-making, a continuous dialogue by virtue of which parties adjust and readjust their relationship for mutual benefit. It can be exercised at various levels, from enhanced empowerment, regional autonomy and federalism to secession. When populations are disenfranchised and cannot exercise their cultural identities, tensions may increase, culminating in armed conflict, the outcome of which might be their military success and consequent independence, or their defeat and decimation. The process did not end with decolonization, with the dissolution of the Soviet Union and Yugoslavia, or with the independence of South Sudan. It continues today as many minorities, indigenous peoples and peoples living under occupation strive to achieve higher degrees of self-administration and self-government. The international community should develop strategies to facilitate early warning and assist States in devising timely solutions.

4. At the outset, it is useful to clarify that the rights holders of self-determination are peoples, a concept that has never been conclusively defined, notwithstanding its frequent use in United Nations forums. Participants at a UNESCO expert meeting on self-determination endorsed what has been called the "Kirby definition",[4] recognizing as a "people" a group of persons with a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection, or common economic life.[5] To this should be added a subjective element: the will to be identified as a people and the consciousness of being a people. A people must be numerically greater than just "a mere association of individuals within the State".[6] Their claim becomes more compelling if they have established institutions or other means of expressing their common characteristics and identity. In plain language, the concept of "peoples" embraces ethnic, linguistic and religious minorities, in addition to identifiable groups living under alien domination or under military occupation, and indigenous groups who are deprived of autonomy or sovereignty over their natural resources.

5. Duty bearers of the right of self-determination are all States Members of the United Nations, who must recognize and promote this right, individually and collectively, pursuant to *erga omnes* provisions of the Charter and human rights treaties. Empowerment of peoples to enjoy human rights without discrimination and to exercise a degree of self-government is crucial for national and international stability. Otherwise, a significant potential for conflict remains.

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[3] See Human Rights Council resolution 24/8.

[4] Michael Kirby, speech delivered at the UNESCO International Meeting of Experts on Peoples' Rights and Self-Determination", Budapest, 25-29 September 1991. Available from www.michaelkirby.com.au/images/stories/speeches/1990s/vol24/906-Peoples'_Rights_and_Self_Determination_-_UNESCO_Mtg_of_Experts.pdf.

[5] See M. van Walt and O. Seroo, eds., "The implementation of the right to self-determination as a contribution to conflict prevention: report of the International Conference of Experts held in Barcelona from 21 to 27 November 1998", UNESCO Centre of Catalonia, 1999. Available from www.unpo.org/downloads/THE%20IMPLEMENTATION%20OF%20THE%20RIGHT%20TO%20SELF.pdf).

[6] UNESCO, "International meeting of experts on further study of the concept of the rights of peoples: final report and recommendations", 1989, UNESCO document SHS-89/CONF.602/7, p. 8. See also the definition of indigenous peoples proposed by José Martínez Cobo in the conclusions and recommendations of his *Study of the Problem of Discrimination against Indigenous Populations* (United Nations publication, Sales No. E.86.XIV.3), para. 379.

6. There are multiple ways of looking at self-determination. One understanding of the right focuses on the legitimacy of choice, so that every people may choose the form of government that it deems appropriate to its culture and traditions. Another perspective focuses on the right of two or more peoples to unify into one single State. An additional aspect emphasizes the possibility of exercising various degrees of cultural, economic and political autonomy within a State entity, and yet another expression of self-determination entails the aspiration to independent statehood. All these manifestations of self-determination should be interpreted in the context of the Charter and human rights treaties, which reject all forms of colonialism, neocolonialism and foreign occupation. As the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations annexed to General Assembly resolution 2625 (XXV) clarifies: "The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people." In all the cases described, self-determination can be understood as a vector of peace and part of a democratic and equitable world order.

7. In this connection, the Independent Expert recalls that the post-Second World War international order has been frequently challenged and changed in response to the aspirations of non-self-governing peoples to achieve internal and external self-determination. In some States, federalism has guaranteed the self-determination right of parts of the population. In others, separation has been the result of armed conflict. It would have been preferable to see the implementation of the right of self-determination occur by virtue of the recognition of entitlement and good-faith negotiation instead of through the use of force. Considering that in the twenty-first century many peoples have not achieved self-determination, it is important for the international community to recognize their aspirations and devise a strategy to facilitate their realization without armed conflict.

8. For human rights, peace, security and stability to flourish, the relationships between peoples and governmental entities must be based on genuine and continuing consent, on the understanding of a *contrat social* and, if this *contrat* is violated by Government, the people as sovereign have the democratic right to redefine the relationship. As Michael van Walt has noted: "Peace cannot exist in states that lack legitimacy or whose governments threaten the lives or well-being of a section of the population. The international community, its members and institutions have an obligation to act where international law, including human rights and especially the right of self-determination, is violated."[7]

9. The present report builds on the Independent Expert's previous reports, which rest on the premise that the Charter of the United Nations is the world's constitution and that the best possibility for human advancement lies in the rule of law. A democratic and equitable international order requires that all States observe the Charter and apply international law uniformly. World peace and security are best served when States observe treaties in good faith (*pacta sunt servanda*) and do not hedge or invent loopholes in implementing treaties that defeat the object and purpose thereof. The credibility of law depends on its uniform application. Norms

[7] See footnote 50.

cannot be applied à la carte. Unilateralism and exceptionalism must be seen as anachronisms in the twenty-first century.[8]

10. In the report, the Independent Expert surveys applicable norms and practices and concludes that international peace and security are at risk as long as peoples have not achieved self-determination, and as long as they suffer occupation and exploitation by foreign Powers. Thus, to achieve a democratic and equitable international order, it is necessary to ensure the enjoyment of self-determination by all peoples, which necessarily includes the right to live in one's homeland without being threatened by ethnic cleansing or expulsion from one's roots, history, land and resources.

11. Although the present interim report focuses primarily on external self-determination, which is where most conflict potential exists, the Independent Expert stresses the advantages of the internal dimension of self-determination.

12. By internal self-determination, we understand participatory democracy, as laid down in article 25 of the International Covenant on Civil and Political Rights, and the right of a population group within the State to participate in decision-making at the State level, which may also entail the right to exercise cultural, linguistic, religious and political autonomy within the boundaries of an existing State. By external self-determination or full self-determination, we understand the right to decide on the political status of a people in the international order in relation to other States, including the right to secede from an existing State.[9]

13. When human rights are enjoyed by all peoples without discrimination and populations have the feeling that they are in control of their destinies, they will be less disposed to seek external self-determination. Arrogance, exclusion, arbitrariness and neglect by Governments can drive peaceful peoples to despair and violence. Instead, Governments owe it to all persons under their jurisdiction to protect their human rights and to deploy confidence-building measures so as to create peaceful societies under the rule of law.

14. The Independent Expert recalls the words of Federico Mayor, former Director-General of the United Nations Educational, Scientific and Cultural Organization (UNESCO), at a UNESCO conference on the right to self-determination:

> In today's global world, the official borders between States have been relativized ... Everything possible must be done to ensure that the immediate political interests of States do not compromise the aspirations of all peoples for freedom and other legitimate rights. There must be negotiation among all the parties involved so that conflict is prevented and peaceful solutions found ... The right to self-determination must include cultural, linguistic and communication rights alongside of social, economic and political rights. One depends on the other.[10]

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[8] See, for example, Commission on Human Rights resolution 2004/64, para. 8.

[9] See also Committee on the Elimination of Racial Discrimination, general recommendation No. 21.

[10] See footnote 5.

II. Norms and practice

15. There is consensus among States, judges of international tribunals and professors of international law that self-determination is not only a principle but also a right that has achieved the status of *jus cogens*. Unfortunately, there is no authoritative definition of the right. As a political rather than a legal concept, self-determination can be traced back many centuries. It suffices to recall the Declaration of Independence of the United States of 4 July 1776, which proclaimed that Governments derive their powers from the consent of the governed and that, "whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or abolish it". Similarly, the French revolution advanced the doctrine of popular sovereignty and considered that any annexation of territory should be by plebiscite.

16. When the President of the United States, Woodrow Wilson, championed the principle of self-determination during the First World War, it sounded utopian in an era of rampant imperialism, colonialism and unabashed exploitation of weaker peoples. The idea was applied very imperfectly at the Paris Peace Conference of 1919, which redrew European frontiers in a manner disadvantageous to the human rights of the defeated nations. Later, the Atlantic Charter of 14 August 1941 established in eight "common principles" a vision for a post-Second World War world order. The second principle enunciated the principle of self-determination as a commitment "to see no territorial changes that do not accord with the freely expressed wishes of the peoples concerned". The third principle affirmed "the right of all peoples to choose the form of government under which they will live".

17. The great step forward was the adoption of the Charter of the United Nations and its emphasis on the principle of self-determination as a cornerstone of peace. Implementing the right of self-determination, however, has posed enormous problems because it requires balancing with other competing interests, notably the principle of territorial integrity. It is with good reason that the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States refers to the norm that "the territorial integrity and political independence of the State are inviolable". This does not mean, however, that flexibility is not possible or that frontiers cannot be subject to adjustment by peaceful negotiation with a view to better serving the purposes and principles of the United Nations. Additional problems arise as a result of geopolitical considerations that frequently affect the consistency and logic of States that enthusiastically recognize the exercise of self-determination by some peoples and just as passionately oppose it in other cases.

18. A review of norms and practice appears appropriate, beginning with the commitments undertaken by all States Members of the United Nations pursuant to Article 1 (2) of the Charter, which lists among the purposes of the Organization to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace". Pursuant to Article 14, the General Assembly may "recommend measures for the peaceful adjustment of any situation, regardless of origin, which it deems likely to impair the general welfare or friendly relations among nations". Pursuant to Article 24, the Security Council "shall act in accordance with the purposes and principles of the United Nations" in discharging its duties. Article 55 stipulates: "With a view to the creation of conditions of

stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote...." Chapter XI is entitled "Declaration regarding Non-Self-Governing Territories",[11] which imposes on the administrating Powers the "sacred trust" to advance the interests of the inhabitants, while Chapter XII established the international trusteeship system, the basic objectives of which were the promotion of "the political, economic, social and educational advancement of the inhabitants of the trust territories, and their progressive development towards self-government or independence" (Article 76).

19. In countless resolutions the General Assembly has affirmed the right of self-determination, notably resolution 2625 (XXV), by which the Assembly adopted the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, whose preamble states "that the principle of equal rights and self-determination of peoples constitutes a significant contribution to contemporary international law, and that its effective application is of paramount importance for the promotion of friendly relations among States." The Declaration recognizes that the foreign subjection, domination and exploitation of peoples violate their human rights and pose a threat to international peace and security. Among its principles the Declaration stipulates: "Every State has the duty to refrain from any forcible action which deprives peoples ... of their right to self-determination and freedom and independence. In their actions against, and resistance to, such forcible action in pursuit of the exercise of their right to self-determination, such peoples are entitled to seek and to receive support in accordance with the purposes and principles of the Charter." Here, it is useful to recall that the international community can devise and employ innovative methods to support the bearers of the right of self-determination, to ensure the protection of their human rights while seeking to prevent or curtail violence and unrest.

20. The Vienna Declaration and Programme of Action, adopted in 1993, recognizes the right of self-determination in its preamble and stresses, in Part I, paragraph 2, that "all peoples have the right of self-determination.... Taking into account the particular situation of peoples under colonial or other forms of alien domination or foreign occupation, the World Conference on Human Rights recognizes the right of peoples to take any legitimate action, in accordance with the Charter of the United Nations, to realize their inalienable right of self-determination." The World Conference participants further fleshed out the links between the pursuance of self-determination and its interrelatedness with human rights by highlighting that the denial of self-determination is a violation of human rights.

21. While the above text recognizes self-determination as an inalienable right, it also points at the necessity of regulating its implementation in the light of other principles of international law, notably the maintenance of local, regional and

[11] See, in this regard, Makane Moïse Mbengue, "Non-Self-Governing Territories", in Max Planck Encyclopedia of Public International Law (http://opil.ouplaw.com/home/EPIL). See also General Assembly resolutions 9 (I), 66 (I), 146 (II), 1332 (XIII), 1466 (XIV), 1514 (XV) and 1803 (XVII). See further United Nations, "What the UN Can do to Assist Non-Self-Governing Territories", 2007, available from www.un.org/en/events/nonselfgoverning/pdf/What%20the%20UN%20can%20do.pdf.

international peace and security, as well as with principles of international human rights law, especially the right to be free from discrimination. The last part of paragraph 2 adds a caveat: "This shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a Government representing the whole people belonging to the territory without distinction of any kind." In other words, although territorial integrity is a reasonable principle of international stability, it is not an immutable norm of international relations and must be balanced against other principles, including human rights and self-determination, which are also conditions for international stability.

22. While General Assembly resolutions and the Vienna Declaration and Programme of Action constitute what may be termed "soft law", they have the virtue of reflecting a very large consensus on these central principles of the Organization. The "hard law" provisions on self-determination are best articulated in common article 1 of the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights, which stipulates:

> 1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> 2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
>
> 3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

23. In its general comment No. 12, the Human Rights Committee stated: "The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. It is for that reason that States set forth the right of self-determination in a provision of positive law in both Covenants and placed this provision as article 1 apart from and before all of the other rights in the two Covenants (para. 1)". The general comment underscores a particular aspect of the economic content of the right of self-determination, namely the right of peoples, for their own ends, freely to dispose of their natural wealth and resources. The general comment continues: "This right entails corresponding duties for all States and the international community. States should indicate any factors or difficulties which prevent the free disposal of their natural wealth and resources contrary to the provisions of this paragraph and to what extent that affects the enjoyment of other rights set forth in the Covenant (para. 5)".

24. Article 2 of the two International Covenants imposes legal obligations on States parties to implement all human rights, including the right of self-

determination, and to provide redress for violations. The Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human rights Law and Serious Violations of International Humanitarian Law (General Assembly resolution 60/147, annex) further underline the obligation of States to respect, ensure respect for and implement international human rights law and international humanitarian law; to take appropriate measures to prevent violations from happening; to investigate violations; and to ensure victims equal and effective access to justice as well as effective remedies.

25. Accordingly, the right of self-determination must be implemented through specific measures, including legislation and adjudication. The bearers of the right of self-determination possess justiciable rights, not mere promises.

26. Lastly, the International Court of Justice has pronounced itself on the principle and application of self-determination, among others in its advisory opinions on Namibia (South West Africa), Western Sahara and the legal consequences of the construction of a wall in the Occupied Palestinian Territory, including commenting on the *erga omnes* character of self-determination.

A. Progressive development of international law

27. The world order before the Charter of the United Nations was neither democratic nor equitable. International law reflected the interests of the great Powers and was codified to strengthen colonial and imperial sustainability. Since 1945 international law has not ceased to evolve. Respect for human rights has become a paramount consideration of legality, and self-determination is now recognized as a principle of legitimacy underlying modern international law.

28. External self-determination can entail unification or secession, the latter being the most contentious aspect. Historically, the separation of one part of a country from another has not been accomplished simply by virtue of pre-existing law, but frequently by force. Whereas the friendly separation of Czechoslovakia into two independent States in 1993 took place without force, the implosion of Yugoslavia in the 1990s was accompanied by war and ethnic cleansing and entailed the destruction of the country's territorial integrity and its separation into new entities and six new States Members of the United Nations. Similarly, the dissolution of the Soviet Union resulted in 15 new States. These are not only historical events, but legal precedents that have expanded the meaning of self-determination beyond the context of decolonization and placed it in the context of the human right to freedom by the expressed will of the peoples concerned.

29. More recent history has shown that the former entities and new States are also subject to internal tensions reflecting ethnic and religious differences, and sometimes the feeling of parts of the population that they cannot fully exercise their human rights in the context of the new State entity. Ensuring all human rights for all parts of the population so that they may feel empowered and represented in the new State entity is in the interest of all parties concerned. Otherwise, existing grievances may develop into a desire for full independence. If the principle of self-determination is recognized with regard to the secession of pa ts of old State entities, it can equally be applied to parts of new State entities.

30. A violation of the right of self-determination gives rise to a legitimate human rights claim by individuals and groups and triggers State responsibility to make reparation. Any such violation of *jus cogens* also has third-party effects and imposes *erga omnes* obligations on other States, however. The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States reaffirms that "every State has the duty to promote, through joint and separate action, realization of the principle of equal rights and self-determination of peoples, in accordance with the provisions of the Charter, and to render assistance to the United Nations in carrying out the responsibilities entrusted to it by the Charter regarding the implementation of the principle".

31. In his final report, the Special Rapporteur of the Subcommission on Prevention of Discrimination and Protection of Minorities on human rights and population transfer, Awn Shawkat Al-Khasawneh, addressed the *erga omnes* issue in article 10 of his proposed draft declaration on population transfer and the implantation of settlers (E/CN.4/Sub.2/1997/23 and Corr.1, annex II):

> Where acts or omissions prohibited in the present Declaration are committed, the international community as a whole and individual States, are under an obligation: (a) not to recognize as legal the situation created by such acts; (b) in ongoing situations, to ensure the immediate cessation of the act and the reversal of the harmful consequences; (c) not to render aid, assistance or support, financial or otherwise, to the State which has committed or is committing such act ...

B. Self-determination and democracy

32. Self-determination is an expression of the individual and collective right to democracy, as democracy is an expression of the individual and collective right of self-determination. Both have national and international dimensions. The hallmark of self-determination must be public participation in decision-making and control over resources. In most cases this can be achieved within existing State entities, inter alia through federalism and other models of autonomy.

33. In the case of Non-Self-Governing Territories, self-determination referendums must be carefully organized so as to guarantee their democratic legitimacy and limit participation to those who really have a link to the Territory and not allow recent settlers and colonizers to participate therein on the same basis as natives;[12] nor can artificial barriers such as language tests be required, given that they sometimes exclude precisely those who are entitled to exercise self-determination. Articles 14, 18, 19, 21, 22 and 25 of the International Covenant on Civil and Political Rights should also inform every process of self-determination. The Vienna Declaration and Programme of Action added: "Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives" (part I, para. 8). Support is also provided by the Forum on Minority Issues, the second session of which was devoted to minorities and effective political participation. It recommended:

[12] Human Rights Committee, *Marie-Hélène Guillot et al. v. France*, communication No. 932/2000, views adopted on 15 July 2002. Cited in J. Möller and A. de Zayas, *United Nations Human Rights Committee Case Law* (Kehl/Strasbourg, N.P. Engel, 2009).

"Governments should take effective measures to end discrimination. They should consider, for instance, instituting independent monitoring and complaints mechanisms designed to prevent discrimination in voting, vote fraud, intimidation and similar acts that inhibit the effective participation of all, especially members of minorities, in electoral activities" (A/HRC/13/25, para. 10).

C. Unification in international law

34. The unification of States is a sovereign act and an expression of self-determination, consistent with the sovereign equality of States stipulated in the Charter. It cannot be frustrated by the geopolitical interests of third States. Thus, peoples who have been separated by the drawing of colonial or other arbitrary frontiers have a right to demand adjustment and reunification. Similarly, artificially separated States have a right to reunification, for example, when the two German States resulting from the surrender of Nazi Germany and the division of its territory into zones of occupation achieved reunification in 1990. Happily, this reunification occurred without the use of force and with the enthusiastic approval of the international community. In the twenty-first century there are other peoples who aspire to reunification. It is in the interest of peace and stability for the United Nations to address these concerns in a timely fashion and assist in coordinating negotiations in accordance with recognized international human rights standards.

III. Right to one's homeland

35. The right to one's homeland is the positive expression of the international prohibition of forced population transfers, recently referred to as ethnic cleansing. It is prior to and inseparable from self-determination. Several conventions specifically prohibit mass expulsions. Judgments and advisory opinions of the International Court of Justice and judgements of international human rights tribunals, including the European Court of Human Rights and the Inter-American Court of Human Rights, have held that forced transfers constitute massive violations of human rights and in particular of the right of self-determination.[13]

36. It would be too easy to frustrate the right of self-determination if it were legal to collectively uproot a population and bring in settlers so as to change the demographics of the territory concerned. In time of armed conflict this is specifically prohibited by article 49 of the Geneva Convention relative to the Protection of Civilian Persons in Time of War, of 12 August 1949 (Fourth Geneva Convention) ("Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country ... are prohibited."). Article 17 (1) of Additional Protocol II of 1977 to the Geneva Conventions applies this prohibition to internal displacements ("The displacement of the civilian population shall not be ordered...."). The expulsion of civilian populations constitutes a "grave breach"

[13] See Council of Europe, Parliamentary Assembly, "Enforced population transfer as a human rights violation", report of the Committee on Legal Affairs and Human Rights, document 12819, 9 January 2012. Available from http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=13204&Language=EN; A. de Zayas, "Forced population transfers", Max Planck Encyclopedia of Public International Law.

under article 147 of the Fourth Geneva Convention and under article 85 of Additional Protocol I of 1977. Mass expulsions are prohibited in the Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

37. In the Rome Statute of the International Criminal Court, the States parties agreed that "deportation or forcible transfer of population" constitutes a crime against humanity under article 7 (d), and that "unlawful deportation or transfer" constitutes war crimes under article 8 (2) (a) (vii). Article 16 of International Labour Organization (ILO) Indigenous and Tribal Peoples Convention, 1989 (No. 169) affirms the prohibition of involuntary transfers with regard to indigenous peoples.

38. Self-determination is inextricably related to the right to live in one's homeland and not be subjected to forced assimilation or mass expulsion. This right was already recognized in academic circles and consecrated in a series of lectures by the French international law expert Robert Redslob, who emphasized that "the forcible transfer of a population cannot be allowed because it violates a fundamental right ... and entails abandoning ... a highest possession, which humankind demands on the basis of a sacred right which all men strive for: the Homeland.... There is a right to the homeland, and it is a human right".[14]

39. Awn Shawkat Al-Khasawneh affirmed the right to the homeland in his final report to the Subcommission, referred to above. Article 4 (2) of the draft declaration states: "No person shall be compelled to leave his place of residence." The then United Nations High Commissioner for Human Rights, José Ayala Lasso, expressed it thus in his introductory remarks to a United Nations expert meeting on population transfers[15] held in Geneva in March 1997: "Mass expulsions violate the gamut of civil, political, economic, social and cultural rights."[16]

40. On 28 May 1995, Mr. Ayala Lasso delivered a statement in Frankfurt, Germany, asserting that "the right not to be expelled from one's homeland is a fundamental human right", thus rejecting collective expulsions and "collective punishment on the basis of general discrimination".

41. An essential component of the right of self-determination and of the right to the homeland is the right to return in safety and dignity to one's home and possessions. This right has been affirmed in many resolutions of the Security Council and General Assembly concerning, among others, Afghanistan, Bosnia and Herzegovina, Croatia, Cyprus, Kosovo,[17] Palestine and Timor-Leste. Article 16 (3)

[14] Robert Redslob, *Collected Courses of The Hague Academy of International Law*, vol. 37 (1931), p. 45; A. de Zayas, *Heimatrecht ist Menschenrecht* (Munich, Universitas, 2001), p. 39.

[15] The expert group affirmed the right to live and remain in one's homeland, i.e. the right not to be subjected to forcible displacement, as a fundamental human right and a prerequisite to the enjoyment of other rights. Reference was made to the extensive discussion of this issue at the session of the Institute for International Law held at Siena, Italy, which had concluded that transfers of population entailed serious violations of human rights. See also A. de Zayas, "The right to one's homeland, ethnic cleansing and the International Criminal Tribunal for the Former Yugoslavia", *Criminal Law Forum*, vol. 6, No. 2 (1995), pp. 257-314.

[16] See A. de Zayas, "Ethnic cleansing: applicable norms, emerging jurisprudence, implementable remedies", in J. Carey, W. Dunlap and R. J. Pritchard, eds., *International Humanitarian Law* (Martinus Nijhoff, 2003).

[17] References to Kosovo shall be understood to be in the context of Security Council resolution 1244 (1999).

of ILO Convention No. 169 affirms the right to return of indigenous peoples who have been displaced.

42. As the Human Rights Committee has stated in its general comment No. 17, "the right to return is of the utmost importance for refugees seeking voluntary repatriation. It also implies prohibition of enforced population transfers or mass expulsions to other countries" (para. 19).

43. The draft declaration on population transfer stipulates in its article 8:

> Every person has the right to return voluntarily, and in safety and dignity, to the country of origin and, within it, to the place of origin or choice. The exercise of the right to return does not preclude the victim's right to adequate remedies, including restoration of properties of which they were deprived in connection with or as a result of population transfers, compensation for any property that cannot be restored to them, and any other reparations provided for in international law.

44. The right to one's homeland is especially relevant to populations living under occupation, indigenous and non-self-governing peoples. Obstacles to the achievement of the implementation of the right to one's homeland, as an expression of the right of self-determination, are the conflicting geopolitical agendas of major powers and the economic interests of transnational corporations over the natural resources of weaker peoples. Frequently, advocates of self-determination are discredited as radicals or irredentists. It is clear that governmental paranoia about irredentism cannot trump a legitimate entitlement of self-determination. Labels aimed at incitement against minorities or indigenous peoples may entail violations of article 20 (2) of the International Covenant on Civil and Political Rights, which specifically prohibits incitement to discrimination, hostility or violence.

IV. Decolonization

45. In the light of the Charter of the United Nations, it became clear that colonialism had to be dismantled, but it was not until the 1960s that the General Assembly adopted groundbreaking resolutions on the subject.

46. The preamble to resolution 1514 (XV) on the Declaration on the Granting of Independence to Colonial Countries and Peoples of 1960 establishes the symbiotic link between self-determination and friendly relations among nations.

47. However, decolonization alone would not have given the formerly colonized peoples a decent future and equal opportunity to participate in global decision-making. It was necessary to adopt resolution 1803 (XVII) on permanent sovereignty over natural resources in 1962, paragraph 1 of which declares: "The right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned."

48. Paragraph 7 stipulates: "Violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations and hinders the development of international cooperation and the maintenance of peace."

49. The decolonization process had already begun on the Indian subcontinent in 1947, followed by the independence of Indonesia in 1949, continuing in Asia, the Pacific Islands, Africa and Latin America. Decolonization was frequently preceded and accomplished by violence, as was the case in numerous African and Asian territories including Algeria, Namibia, Timor-Leste and Zimbabwe.

50. Decolonization was not only just and consistent with the Charter; it was necessary to end violence. Initially, decolonization was conducted on the basis of the *uti possidetis* doctrine, which had characterized the liberation of Latin American republics from Spanish and Portuguese rule, providing for the maintenance of the old colonial frontiers. In the African context, however, *uti possidetis* ushered in many potential conflicts.

51. From 1960 to 1962, the decolonized Belgian Congo experienced a war in which two of its ethnically different and mineral-rich provinces unsuccessfully attempted secession. From 1967 to 1970, the Igbos of Nigeria unsuccessfully attempted to separate and the Biafran war left 1 million casualties in its wake. In 1971, East Pakistan separated and emerged as the new State of Bangladesh. In 1975, Timor-Leste became independent from Portugal, was invaded and occupied by Indonesia and emerged as a new independent State in 2002. In 1991, after a 30-year war, Eritrea gained its independence from Ethiopia, following a referendum supervised by the United Nations. In 2011, after a 20-year war, South Sudan separated from the Sudan pursuant to a referendum also organized by the United Nations. Thus, it is clear that decolonization did not pronounce the last word on self-determination. To avert future armed conflict, timely adjustment of frontiers is a peace-promoting policy that should be applied with international solidarity. There is no reason to insist on the "sanctity" of national borders, which sometimes owe their existence to very unsaintly means.

52. Secession has also occurred outside the decolonization context in response to a people-centred perception that full independence is the only means to restore fundamental rights and freedoms. This aspect of self-determination draws its legitimacy from the fundamental right of rebelling against tyranny, a right of last resort specifically referred to in the preamble to the Universal Declaration of Human Rights.[18]

V. Non-self-governing and indigenous peoples

53. When the Charter was adopted, many peoples lived under foreign rule. Colonialism was widespread, peoples were subjected to military occupation and minorities and indigenous peoples had little or no international protection.

54. The process of self-determination did not end with decolonization and the independence of trust territories. Even today there are many unrepresented peoples and nations, peoples living under occupation and a majority of indigenous peoples in several continents who aspire to exercise self-determination, whether in the form of autonomy within existing States or independence. It is therefore necessary to devote attention to their situation, consult with the peoples concerned and ensure

[18] "[I]t is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."

their right to participate in decision-making, in particular on all matters that directly concern them, their lands, their natural resources and their culture.

55. There is a list of 17 remaining Non-Self-Governing Territories for which the Special Committee on the Situation with regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples carries out a degree of supervision.[19] This list is obviously incomplete, however, given that there are other non-self-governing peoples who aspire to have a voice before the Committee. The question thus arises whether other territories should be added to the list on the ground that the populations claim that they do not enjoy self-determination. Moreover, there are questions concerning the earlier delisting of some Territories for which the administrating Powers have ceased to report, but whose delisting has been described by observers as "irregular".

56. Even today, indigenous peoples and colonized and occupied peoples are not vested with their proper status at the national or international level. The United Nations could grant them such status as a corollary to the right of self-determination in a manner that allows for their equal participation and their free, prior and informed consent on all matters that affect them and at all levels within the United Nations system. Part of the problem with the delayed discussion on the self-determination of indigenous peoples was the fact that Governments essentially marginalized them. Moreover, the devastating impact of the policies applied by the colonizers, including massacres, spoliation, re-education and cultural dislocation paralysed many indigenous peoples. Michael van Walt observed that "a number of first nations of the Americas ... no longer exist as a result of genocide".[20] A partial recognition of the injustices is reflected in several apologies issued by Governments over the past two decades.[21] Such apologies are appropriate, but a proactive policy to reduce continuing effects and to heal the profound trauma inflicted on indigenous peoples is necessary.

57. As history has witnessed, indigenous peoples have been unable to achieve autonomy or self-government and obtain redress in the same ways as other rights bearers. This is attributable in part to the devastation of their numbers and the assault on their culture, which rendered them too weak to assert their rights and frequently left them in extreme poverty, unable even to obtain adequate legal representation.[22] Greater access to the international forum and the permeation of

[19] In Africa: Western Sahara. In the Atlantic and Caribbean: Anguilla, Bermuda, British Virgin Islands, Cayman Islands, Falkland Islands (Malvinas), Montserrat, St. Helena, Turks and Caicos Islands, United States Virgin Islands. In Europe : Gibraltar. In Asia and the Pacific: American Samoa, French Polynesia, Guam, New Caledonia, Pitcairn and Tokelau.

[20] See footnote 5.

[21] Apology by the United States Government to the Hawaiian people, 1993; apology by the Government of Australia to Australia's indigenous peoples, 2008; apology by the United States Government to native peoples of the United States, 2010; apology by the Government of Canada for injustices to the native peoples, 1998; apology by the Government of Canada to former students of Indian Residential Schools, 2008; apology by the Government of Sweden to the Sami people, 1998; apology by King Harald V of Norway to the Sami people, 1997.

[22] Bartolomé de las Casas, *Brevísima relación de la destrucción de las Indias (A Brief Account of the Devastation of the Indies)*, 1542; Richard Drinnon, *Facing West* (University of Oklahoma Press, 1997); Frederick Hoxie, ed., *Encyclopedia of North American Indians* (Houghton Mifflin Harcourt, 1996), in particular the entry "Population: precontact to present"; David Stannard, *American Holocaust* (Oxford University Press, 1992; Eduardo Galeano, *Open Veins of Latin America* (Monthly Review Press, 1997).

human rights principles has allowed indigenous peoples to emerge from this past powerlessness.[23]

58. It is time to face "historical inequities"[24] and abandon the culture of silence. There are many open accounts worldwide that should be settled — peacefully — through good-faith negotiation with indigenous peoples, whose inalienable rights have not been extinguished through lapse of time or through the racist and factually inapplicable doctrine of discovery (see E/C.19/2014/3). A breakthrough was achieved in 1992 in Australia when the High Court, in *Mabo and others v. Queensland*, overturned the *terra nullius* doctrine.[25] Similarly, the Supreme Court of Canada in a number of recent judgements has ruled in favour of the claims of First Nations to the return of their lands.[26] As the Permanent Forum study observes: "The Doctrine of Discovery is significant globally not only for abuses in the past, but also for its ongoing far-reaching consequences. Such colonial doctrines must not prevail in practice over human rights, democracy and the rule of law" (ibid., para. 32).

59. The adoption of ILO Convention No. 169 was of enormous importance, especially considering that indigenous populations are still subject to dispossessions and involuntary transfers.

60. The United Nations Declaration on the Rights of Indigenous Peoples constitutes a milestone in the struggle of indigenous peoples for self-determination and provides an important catalogue of rights and entitlements that should guide both Governments and the indigenous peoples themselves. Beginning in its preamble, the Declaration expresses concern "that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests". Article 3 stipulates: "Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." Article 8 (1) affirms that indigenous peoples and individuals have the "right not to be subjected to forced assimilation or destruction or their culture". Article 19 states: "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them." Article 28 (1) stipulates that indigenous peoples have the right to get back or be compensated when the lands, territories or resources have been wrongly taken away, occupied, used or damaged without their free, prior and informed consent. Article 32 further stipulates that indigenous peoples have the right to decide how they wish to develop their lands and resources. Governments must respect and protect these rights. Indigenous peoples' free, prior and informed consent must be obtained when any decisions are made that may affect the rights to

[23] See www.idlenomore.ca/.

[24] *Chief Bernard Ominayak and the Lubicon Lake Band v. Canada*, communication No. 167/1984, views of the Human Rights Committee adopted on 26 March 1990, p. 33: "Historical inequities to which the State party refers, and certain more recent developments threaten the way of life and culture of the Lubicon Lake Band, and constitute a violation of article 27 [of the International Covenant on Civil and Political Rights] so long as they continue." Cited in Möller and de Zayas, p. 447.

[25] www.aiatsis.gov.au/_files/ntru/resources/resourceissues/mabo.pdf.

[26] See http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do.

their lands, resources or waters (see A/HRC/18/35). Justice and equity require that many of these articles be given some retroactive effect, so as to counter the continuing effects of earlier injustices and grant a measure of rehabilitation.

61. Unfortunately, some States reject the Declaration, considering it to be non-binding. In this regard, the Special Rapporteur on the rights of indigenous peoples, James Anaya, has observed:

> Debilitating to the Declaration are repeated assertions that the Declaration is non-binding, characterizations of the Declaration as granting privileges to indigenous peoples over others, and the position advanced by some States that the right to self-determination affirmed in the Declaration is different from self-determination in international law. These assertions and positions are each flawed ... they only serve to weaken the force of the broad consensus underlying the Declaration and of its role as an instrument of human rights and restorative justice (A/68/317, para. 88).

62. With regard to sovereignty over natural resources, the Special Rapporteur has suggested that a new model more conducive to indigenous peoples' self-determination and their right to pursue their own priorities of development is needed, noting that direct negotiations between companies and indigenous peoples may be the most efficient and desirable way of arriving at agreed-upon arrangements for the extraction of natural resources (A/HRC/21/47, para. 70).

VI. Criteria for the exercise of self-determination

63. Any process aimed at self-determination should be accompanied by participation and consent of the peoples concerned. It is possible to reach solutions that guarantee self-determination within an existing State entity, e.g. autonomy, federalism and self-government.[27] If there is a compelling demand for separation, however, it is most important to avoid the use of force, which would endanger local, regional and international stability and further erode the enjoyment of other human rights. Therefore, good-faith negotiations and the readiness to compromise are necessary; in some cases these could be coordinated through the good offices of the Secretary-General or under the auspices of the Security Council or the General Assembly.

64. To address the multiple and complex issues involved in achieving self-determination, a number of factors have to be evaluated on a case-by- case basis. In this context, it would be useful if the General Assembly were to request the International Court of Justice to issue advisory opinions on the following questions: What are the criteria that would determine the exercise of self-determination by way of greater autonomy or independence? What role should the United Nations play in facilitating the peaceful transition from one State entity to multiple State entities, or from multiple State entities to a single entity?

65. Some of the factors to be taken into consideration in the context of unification, autonomy or secession are described in the following paragraphs.

[27] See the rationale for the judgement of the Supreme Court of Canada concerning Québec, available from www.scc-csc.gc.ca/case-dossier/info/dock-regi-eng.aspx?cas=25506.

66. Self-determination has emerged as a *jus cogens* norm and is enshrined in Article 1 of the Charter as one of the purposes of the Organization. The right is not extinguished with lapse of time because, just as the rights to life, freedom and identity, it is too important to be waived. All manifestations of self-determination are on the table: from a full guarantee of cultural, linguistic and religious rights, to various models of autonomy, to special status in a federal State, to secession and full independence, to unification of two State entities, to cross-border and regional cooperation.

67. The implementation of self-determination is not exclusively within the domestic jurisdiction of the State concerned, but is a legitimate concern of the international community.

68. The rule of law entails more than positivism, which is seldom adequate to solve complex political situations that require flexibility and compromise. More important is the spirit of the law, those principles that underlie the codification of norms as an approximation of justice.

69. Neither the right of self-determination nor the principle of territorial integrity is absolute. Both must be applied in the context of the Charter and human rights treaties so as to serve the purposes and principles of the United Nations.

70. The principle of territorial integrity cannot be used as a pretext to undermine the State's responsibility to protect the human rights of the peoples under its jurisdiction. The full enjoyment of human rights by all persons within a State and peaceful coexistence among States are the principal goals to achieve. Guarantees of equality and non-discrimination are necessary for the internal stability of States, but non-discrimination alone may not be enough to keep peoples together when they do not want to live together. The principle of territorial integrity is not sufficient justification to perpetuate situations of internal conflict that may erupt in civil war and threaten regional and international peace and security.

71. International law evolves through practice and precedents. The independence of the former Soviet republics and the secession of the peoples of the former Yugoslavia created precedents for the implementation of self-determination that must be considered whenever self-determination disputes arise.

72. The aspiration of peoples to fully exercise the right of self-determination did not end with decolonization. There are many indigenous peoples, non-self-governing peoples and populations living under occupation who still strive for self-determination. Their aspirations must be taken seriously for the sake of conflict prevention. The post-colonial world left a legacy of frontiers that do not correspond to ethnic, cultural, religious or linguistic criteria. This is a continuing source of tension that may require adjustment in keeping with Article 2 (3) of the Charter. The doctrine of *uti possidetis* is obsolete and its maintenance in the twenty-first century without possibility of peaceful adjustments may perpetuate human rights violations.

73. The United Nations could be called upon to assist in the preparation of models of autonomy, federalism and, eventually, referendums. A reliable method of determining public opinion and avoiding manufactured consent must be devised so as to ensure the authenticity of the expression of public will in the absence of threats of or the use of force. Long-standing historical links to a territory or region, religious links to sacred sites, the consciousness of the heritage of prior generations as well as a subjective identification with a territory must be given due weight.

Agreements with persons who are not properly authorized to represent the populations concerned and *a fortiori* agreements with puppet representatives are invalid. In the absence of a process of good-faith negotiation or plebiscites, there is a danger of armed revolt.

74. A consistent pattern of gross and reliably attested violations of human rights against a population negates the legitimacy of the exercise of governmental power. In case of unrest, dialogue must first be engaged in the hope of redressing grievances. States may not first provoke the population by committing grave human rights abuses and then invoke the right of self-defence in justification of the use of force against them. That would violate the principle of estoppel (*ex injuria non oritur jus*), a general principle of law recognized by the International Court of Justice. Although all States have the right of self-defence from armed attack under Article 51 of the Charter, they also have the responsibility to protect the life and security of all persons under their jurisdiction. No doctrine, not that of territorial integrity nor that of self-determination, justifies massacres; neither doctrine can derogate from the right to life. Norms are not mathematics and must be applied with flexibility and a sense for proportionality in order to reduce and prevent chaos and death.

75. Secession presupposes the capacity of a territory to emerge as a functioning member of the international community. In this context, the four statehood criteria of the Montevideo Convention on the Rights and Duties of States (1933) are relevant: a permanent population; a defined territory; government; and the capacity to enter into relations with other States.[28] The size of the population concerned and the economic viability of the territory are also relevant. A democratic form of government that respects human rights and the rule of law strengthens the entitlement. The recognition of a new State entity by other States is desirable but it has declaratory, not constitutive, effect.

76. When a multi-ethnic and/or multi-religious State entity is broken up, and the resulting new State entities are also multi-ethnic or multi-religious and continue to suffer from old animosities and violence, the same principle of secession can be applied. If a piece of the whole can be separated from the whole, then a piece of the piece can also be separated under the same rules of law and logic. The main goal is to arrive at a world order in which States observe human rights and the rule of law internally and live in peaceful relations with other States.

77. Sustainable internal and external peace requires the implementation of self-determination of peoples, which is an expression of democracy: government by consent of the governed. As Willy Brand said in his Nobel Peace Prize lecture, waging war to prevent self-determination is the *ultima irratio*.

VII. Outlook and recommendations

78. **Self-determination is a work in progress, a process of adapting and readapting to tensions between power and freedom. Rather than perceiving self-determination as a source of conflict, a better approach is to see armed conflict as a consequence of the violation of self-determination. There are many**

[28] See www.jus.uio.no/english/services/library/treaties/01/1-02/rights-duties-states.xml.

countries in which issues of enhanced democracy, autonomy and self-government require timely discussion.

79. A peaceful, democratic and equitable international order is best served by a symbiotic accommodation of the principle of territorial integrity, vindicated by States, and the right of self-determination held by peoples. Both are subject to adjustment and should not be treated as hyperboles of immutable law. While the extreme notion of sovereignty has a territorial fixation, sometimes the concept of self-determination is reduced to only one option: separation. There are multiple ways of exercising self-determination, the implementation of which constitutes an important strategy to promote national and international stability and prevent ethnic or religious tensions from developing into breaches of local, regional or international peace.

80. There is an emerging customary international law on self-determination that takes into account the emergence of new State entities following the dissolution of the Soviet Union and Yugoslavia and the friendly separation of Czechoslovakia. This customary international law is not self-executing, however.

81. International law being dynamic, it is no longer the same as it was at the beginning of the twentieth century, or at the end of the Second World War. There has been a progressive development towards the primacy of human rights over State rights. Many international lawyers, political scientists and sociologists recognize that, whereas States are pragmatic constructs that enable effective exercise of jurisdiction, and while many States have been shaped by imperial and colonial policies that disregard geographic, ethnic, religious, linguistic and historical realities, peoples constitute another kind of reality, an older and deeply felt force that binds generations and survives changes in boundaries and Governments. Whereas the principle of territorial integrity is a legal, political and pragmatic construct, the right of self-determination has a profound ethical basis.[29]

82. Meanwhile, the principle of territorial integrity no longer possesses a higher status in international law than the right of self-determination, which is anchored in the Charter of the United Nations and in the International Covenants on Human Rights. A balancing of rights and interests must be carried out, always with a view to achieving greater respect for human rights and widening the democratic space.

83. There remains insufficient consciousness in the international community of the enormity of the injustice that colonialism and settlement meant for the peoples of many continents. It is to be welcomed that gradually, politicians have found words to apologize. Apologies should, however, be followed by rehabilitation.

84. In recent decades, the international community has witnessed instances of the reunification of States and also the separation of States into independent State entities. Current and future conflicts concerning the implementation of self-determination should be solved by negotiation within the context of the Charter and the rule of law.

85. Bearing in mind that international law is universal, the criteria for exercising and recognizing the right of self-determination must be applied

[29] See footnote 5.

uniformly. Otherwise, the credibility and predictability of international law would be seriously compromised. The modern perspective on self-determination focuses on its function as a means to promote peace. In short: States have the sacred duty to ensure peace, while individuals and peoples have the right to peace.[30]

86. **On the basis of the foregoing, and with the view to advancing the implementation of General Assembly resolution 68/175, the Independent Expert recommends that States:**

(a) **Take measures to implement common article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which stipulates the right of all peoples to self-determination;**

(b) **Treat all populations under their jurisdiction in accordance with internationally accepted human rights norms, enable their participation in decision-making, consult them, provide legal remedies for violations of their rights and ensure enforcement of judicial decisions;**

(c) **Proactively report to the Human Rights Council on the enjoyment of self-determination by populations under their jurisdiction, pursuant to the universal periodic review procedure. They should similarly report on self-determination matters to the Human Rights Committee and to the Committee on Economic, Social and Cultural Rights;**

(d) **Demonstrate that they are prepared to work towards a peaceful change of status through democratic political means, especially in situations of protracted conflict;**

(e) **Assist post-secession States in establishing the rule of law and ensuring human rights;**

(f) **Surpass the minimum required by human rights treaties and implement soft law in the spirit of the Charter. They should not shun good-faith pledges and commitments merely because they do not constitute "hard law";**

(g) **Enforce treaties made with indigenous populations (see E/CN.4/Sub.2/1999/20) and negotiate only with their legitimate representatives. Decisions affecting indigenous peoples must be taken with their free, prior and informed consent. States should adopt appropriate national legislation to implement the provisions of the United Nations Declaration on the Rights of Indigenous Peoples and ILO Convention No. 169;**

(h) **Recognize and support indigenous peoples' legal systems and parliaments, which should have a special status so as to authentically represent their communities nationally and internationally.**

87. **He also recommends that the General Assembly:**

(a) **Consider establishing a special mechanism to monitor the reality of self-determination today, in particular the situation of unrepresented peoples and non-self-governing peoples who are not currently being considered under**

[30] A. de Zayas, "Peace as a human right", in A. Eide, J. Möller and I. Ziemele, eds., *Making Peoples Heard* (Leiden, Martinus Nijhoff, 2011), pp. 27-43.

Article 73 of the Charter, or assign more targeted functions to the Fourth Committee of the General Assembly, so as to supervise the proper application of Chapter XI procedures;

(b) Consider tasking the Human Rights Council with the examination of self-determination issues as a permanent item in its agenda or as part of the universal periodic review procedure, especially from the functional perspective of self-determination as a tool to promote international peace and security;

(c) Consider referring to the International Court of Justice for advisory opinions on specific legal questions concerning the scope of application of self-determination, its *erga omnes* implications, and issues of restitution and reparation to victims;

(d) Consider employing the good offices of the Secretary-General to advance the implementation of self-determination;

(e) Consider activating the special status of indigenous peoples and granting them, along with colonized and occupied populations, standing to participate in the General Assembly and its subsidiary bodies;

(f) Demonstrating the same realism shown in General Assembly resolutions 1654 (XVI) and 1803 (XVII), proactively assist in the peaceful achievement of self-determination by non-self-governing peoples and peoples living under occupation in the twenty-first century, bearing in mind that the post-colonial world inherited ethnic, social and religious problems resulting from the arbitrary drawing of frontiers;

(g) Consider developing programmes of assistance and transitional justice to support peoples who have recently attained self-determination, in cooperation with United Nations agencies including the United Nations Children's Fund, the United Nations Development Programme, ILO, the World Health Organization, UNESCO, the United Nations Environment Programme and the World Intellectual Property Organization.

88. By way of conclusion, the Independent Expert expresses appreciation to the Office of the High Commissioner for Human Rights and its staff, a centre of excellence and positive impulses. He urges the General Assembly to grant enhanced resources to the Office so that it can strengthen its work for all members of the human family, including through the provision of advisory services and technical assistance and appropriate follow-up mechanisms.

89. The Independent Expert endorses the vision of Rigoberta Menchú, 1992 Nobel Peace Prize Laureate, who champions:

> The hope of those who have learned to resist, who have learned to build and dream of a brighter future — a future in which a sense of community and a respect for nature become parameters for coexistence, a future in which cultural and linguistic diversity is seen as the great wealth of humankind. It is our deepest desire that this new millennium be based in equality, in justice at both the national and international levels, in the free self-determination of all peoples, and in a harmonious relationship with nature. Only then will it be possible to nurture sustainable development as well as an equitable distribution of wealth. Thus will peace sustain itself.